No. 15,430

United States Court of Appeals

For the Ninth Circuit

SAM BLASSINGAME,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from United States District Court for the Western District of Washington, Northern Division, No. 49,488.

BRIEF FOR APPELLANT.

BENJAMIN M. DAVIS,
JAMES W. FUNSTEN,
479 Flood Building,
San Francisco 3, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Codes

Rules

Texts

No. 15,430

United States Court of Appeals
For the Ninth Circuit

SAM BLASSINGAME,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from United States District Court for the Western District of Washington, Northern Division, No. 49,488.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

Appellant was convicted in the United States District Court, Western District of Washington, Northern Division, upon two counts of violation of the Federal Narcotic Laws, in particular of violation of Section 174, Title 21, U.S.C., and Section 4704(a), Title 26, U.S.C. (R 4, 5). Judgment was rendered on January 28, 1957, sentencing appellant to five years imprisonment upon each count, the sentences to run consecutively, and imposing a fine upon the appellant (R 7, 8).

Notice of appeal was filed on January 29, 1957 (R 9).

Counsel for appellant submit that this Honorable Court has jurisdiction to hear this appeal from the judgment of the District Court by virtue of provisions of Section 1291, Title 28, U.S.C., which provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.

Counsel submit that this is not a case wherein a direct appeal to the Supreme Court of the United States may be had.

SUMMARY OF THE CASE.

The Indictment charged the appellant in four counts with violations of the Federal Narcotic Laws. Counts I and II charged violation on May 29, 1956 of Section 174, Title 21, U.S.C. and Section 4705(a), Title 26, U.S.C. Counts III and IV charged violation on June 19, 1956 of Section 174, Title 21, U.S.C. and Section 4704(a), Title 26, U.S.C.

As evidence to prove the charges under Counts I and II the prosecution introduced the testimony of federal and state narcotic enforcement officers which was to the effect that an informer, one Johnny Clark, under their surveillance and cooperating with them, obtained narcotics at a residential building, which narcotics did not bear the appropriate revenue stamps. Apparently, the officers had neither ever been in the building, nor kept the building under surveil-

lance. The evidence shows that at least two persons other than the informer and a person alleged to have been the defendant were present in the building. There is no testimony as to what went on in the building, and there is no testimony tending to connect the defendant with narcotics, excepting testimony that the defendant admitted the informer into the building and let him out and excepting testimony that the defendant by telephone permitted the informer to come see him. Motion to dismiss, treated as a motion for Judgment of Acquittal was made at the conclusion of the prosecution's evidence and at the conclusion of the defense but at both times ruling was reserved by the Court. The jury found the defendant not guilty upon these counts. Counsel contends that submission of them to the jury was prejudicial to the determination of Counts III and IV.

The prosecution called the alleged informer, Johnny Clark, as a witness; however, after a very few questions bearing upon the charges of Counts I and II, the prosecution claimed surprise by his testimony, which failed to support the prosecution's case. The Court ruled that there was surprise on the part of the prosecution. Counsel contends that in order that there be a right to impeach there must have been affirmative hostile testimony.

There was lengthy cross-examination of the witness and a reading of an alleged prior inconsistent statement, all of which, counsel submits, went far beyond any purpose of explaining the reason for which he was called and attacking his credibility upon those

questions to which the answers were claimed to be a surprise. One of these questions was whether the witness was presently charged with murder in the state Court, and another carried the inference that the witness, prior to the date stated in Counts I and II had received narcotics from the defendant. A mistrial was requested after both of those questions. Counsel for the appellant contends that right to claim surprise, if it existed, was misused by the prosecution to present material which was highly prejudicial and inadmissible and not justified on the grounds of surprise.

Counts III and IV charged unlawful acts on June 19, 1956. There was repeated testimony that before any action was taken that day there was a conference with the same Johnny Clark, a witness under Counts I and II. Counsel contends that this testimony made a direct relation between the error in the proof of Counts I and II, and the verdict in Counts III and IV. The testimony as to June 19, 1956 was that after the conference, three narcotics enforcement officers raced to a certain darkened intersection. Testimony then is that they searched around a fireplug at that intersection, then drove downhill away from the intersection sixty feet and parked; that one of them drew the attention of the others to a figure upon some stairs leading away from the intersection; that then two of them got out of the car and went up the hill, but that the other agent rolled the car down the hill, turned it around, and drove it up the hill with the lights on; that the figure stopped over the fire plug; that all

three officers saw him in the lights of the car back upon the stairs going away but looking back, and that he was the defendant; that he continued up to the top of the stairs where he paced for thirty seconds, but he was not pursued beyond the intersection; that narcotics were found at the fire plug; and that thereafter a man other than the defendant was arrested at the intersection. The testimony is conflicting as to why the defendant was not arrested on the evening in question, nor until three months later. Counsel for the appellant raises the question of whether the evidence was sufficient to send this case to the jury, and in particular, whether reasonable minds must not find, believing all the evidence of the prosecution, that another person, other than the person testified to be defendant could have left the package at the fire plug in the interval while the officers were parked down the hill.

Counsel further submits that it is open to doubt how the jury would have determined if the evidence under Counts I and II had been presented without error, or had been excluded from the jury's final consideration.

SPECIFICATION OF ERROR.

1. The Court erred in reserving ruling (R 175) upon defendant's motion as follows:

> defendant . . . moves this Court to dismiss Counts 1 and 2 of this Indictment for the reason that there is no proof in this case sufficient to take this case to the jury. (R 173.)

The motion was renewed after defendant's evidence (R 207) and again ruling was reserved.

2. The Court erred in not granting a mistrial when the U.S. Attorney adduced evidence of a witness, whom he had called, as follows:

> Q. You are charged with murder in the State Court, are you not?
>
> A. That is right. (R 111.)

Objection was made and sustained by the Court, motion for mistrial was made by defense counsel, and the Court instructed the jury as follows:

> Members of the jury. The Court sustained the objection to the question and you should disregard the answer made, if any, and also you are not to give any effect or draw any inferences from the question and the fact that it was put (R 111).

3. The Court erred in permitting the U.S. Attorney to read from a document over the objection of counsel for the defendant. The first reading was done through a witness as follows:

> Q. Look at the first page. What date does this document bear at the top?
>
> A. That says May 29, 1956.
>
> Q. What city?
>
> A. Seattle, Washington.
>
> Q. And it says by whom? (R 110).

Objection was made by defense counsel (R 110). Later the U.S. Attorney began again to read from the document and defense counsel objected as follows:

> May the record show that the defendant Blassingame objects to any reading of this statement

on the ground it is an attempt to impeach this witness without a proper foundation being laid for it? (R 113).

The Court said, "The record may so show," then the U.S. Attorney continued as follows:

Q. (By Mr. Roberts). ——Johnny, in this statement, which is over your signature, the following is said: "On this date * * *" May 29, 1956, "* * * I was searched by Narcotic Agent L. E. Gooder in the presence of Detectives Sprinkle and Waitt. They looked in my sox and shoes even. I did not have any narcotics on my person."

Later, the U.S. Attorney continues:

Q. ". . . I was supplied with $25.00 Government advance funds by agent Gooder. I previously had signed a receipt for Agent Fahey for this money." (R 113).

And later, he continues:

Q. "About 9:00 p.m. I met Detectives Waitt, Sprinkle, Henaby, and Kirschner at the King Street Depot as planned and then we went to the Agents Gooder and Fahey. From there we went to 19th and Roy where we all joined and I made a telephone call from the public phone booth in the presence of Detective Sprinkle."

He then continues:

"I dialed EAst 8797 and Sam Blassingame answered. Detective Sprinkle had his ear to the phone also and he could hear the conversation on both ends."

Defense counsel interposed a running objection to which the U.S. Attorney stipulated, then the U.S. Attorney continued:

> "I asked Sam how long he was going to be around, and was it all right for me to come out" . . . "He said, 'Come on.' " (R 115).

And later, he continues:

> "This is the time then I was searched and also the officers put some sort of recording device, I guess you call it, on me, and strapped it around me. I don't know what it is other than what they have told me. I went in the Government car with Gooder and Sprinkle and Waitt to a spot south of Thomas on 22nd from where you can see "Chinkie's' house." (R 115).

And later he continues:

> Did you also tell the officers: "Detective Sprinkle went with me and I could see him around in the lot," . . . (R 115).

4. The leading questions of the U.S. Attorney of his own witness though not directly objected to, counsel contends, were improper and should not have been allowed. The most harmful were:

> Isn't it a fact, Johnny, that you knocked on the door, and that Sam opened the door and let you in, and that you gave him $25.00 in money that the agent had given you on May 29th? (R 116).
>
> Didn't you also tell him at that time that you wanted a spoon of stuff? (R 116).
>
> Isn't it a fact that at that time he took you into the living room and said he couldn't find his stuff, and then he went to the phone and called some-

one, and asked to speak to "Chink", and then he said, "Come on home, I can't find the thing," to the party he was talking to on the phone? (R 116).

And didn't you just sit around the apartment with Sam "awhile and finally I asked him * * *" didn't you ask him if you couldn't get that thing, and he just nodded his head and said, "She is coming"? (R 117).

Isn't it a fact a little while later Chinkie came in and there wasn't a word said, that she just went down to the basement and came back carrying a rubber package which she gave to Sam, and she said, I think, "I asked you if you were going to use this stuff tonight before I put it away"; didn't that take place? (R 117).

Didn't Sam take that rubber package and pour out a spoon for you right there on the couch where he was sitting? (R 117).

And isn't it a fact that after this you left the apartment and rejoined Detective Sprinkle and went and met with Sprinkle and Gooder and delivered this parcel of heroin which you just purchased from Sam? Didn't you do that on the evening of May 29th? (R 118).

5. The Court erred in not granting a mistrial, counsel contends, when the U.S. Attorney asked the following, as shown by the record on appeal at page 117,

Q. Didn't you ask him if this was the same stuff you had been——

Mr. Roberts. Strike that. I believe that is material, your Honor. I will rephrase the question.

Q. (By Mr. Roberts, continuing). Didn't you also ask Sam Blassingame at the time he was pouring this spoon for you if this was the same stuff you had been getting? (R 117).

Counsel for the defendant objected:

Mr. Chavelle. I object to that, your Honor, and ask for a mistrial. Counsel was admonished to not go into that at all, and he is referring to some other transaction, or other stuff, that this man is alleged to have obtained from the defendant. We have a stipulation it will not be referred to and it has been referred to. It is prejudicial to the defendant's case (R 117-118).

The U.S. Attorney added:

Mr. Roberts. This is a direct quote of a conversation that actually took place at the time of this sale (R 118).

The Court sustained the objection.

6. Counsel submits that it was error to submit Counts III and IV to the jury in that reasonable minds would find that there could be another hypothesis of the testimony adduced which would exclude guilt of the defendant.

ARGUMENT OF THE CASE.

The Indictment charged the appellant in four counts with violations of the Federal Narcotic Laws. Counts I and II charged violation on May 29, 1956

of Section 174, Title 21, U.S.C. and Section 4705(a), Title 26, U.S.C. Counts III and IV charged violation on June 19, 1956 of Section 174, Title 21, U.S.C. and Section 4704(a), Title 26, U.S.C. (R 3, 4).

The argument relating to the evidence offered to show unlawful acts on May 29, 1956 is upon two questions:

(1) whether the District Court erred in not granting judgment of acquittal upon Counts I and II,

(2) and whether the District Court erred in its rulings regarding evidence presented under these counts, whether the United States Attorney engaged in misconduct, in his questioning of the witness Johnny Clark, and whether the Court should not have granted a mistrial when requested by defense counsel.

The argument relating to the evidence offered to show unlawful acts on June 19, 1956 is upon two questions:

(3) whether the errors and misconduct set out above were substantially prejudicial to the defendant on his trial upon Counts III and IV.

(4) whether the evidence adduced by the Government in support of Counts III and IV of the Indictment was insufficient to take the case to the jury, or to support the verdict upon these Counts of the Indictment.

(5) and whether the error under Counts I and II may well have affected the verdict upon Counts III and IV.

treated by the Court and by the U.S. Attorney as a motion for judgment of acquittal (R 174, 175, 176). In *United States v. Goldstein,* 2nd Cir., 168 F. 2d 666, 669, the terminology "motion to dismiss" was used by the Court in discussion of the application of Rule 29(a) of the Federal Rules of Criminal Procedure. Ruling upon the motion was reserved by the Court both before the defendant put in his evidence and after the presentation of all of the evidence. Counsel contends that the reservation of decision upon the motion was error, or, at least an abuse of discretion which prejudiced the appellant upon the trial of Counts III and IV.

The applicable provision of the Federal Rules of Criminal Procedure is as follows:

Rule 29. Motion for Acquittal

> (a) Motion for Judgment of Acquittal. . . . The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . .
>
> (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, . . .

Counsel submits that the rule applies as well to a motion regarding one count of a plural indictment, as to the entire indictment. Though prior to the adoption of the Federal Rules of Criminal Procedure there

was authority that such a motion would be denied if the evidence was sufficient under any count of the indictment, presently authority and practice is different under the above quoted rule. Cases in which judgment of acquittal was rendered as to some of the counts of a plural indictment are *United States v. Bozza,* 3rd Cir., 155 F. 2d 592, and *United States v. Bianco,* D.C. Pa., 103 F. Supp. 867. Authority for this practice is found in Judgment Notwithstanding the Verdict in Federal Criminal Cases by Lester B. Orfield, Member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure, 16 Univ. of Pittsburgh Law Review 101, 115, and in Cyclopedia of Federal Procedure, 3rd Ed., Section 48.193.

Counsel contends that the submission of the matters charged under Counts I and II to the jury was prejudicial in that all counts of the indictment were related in that the same types of acts were charged, and in that the prosecution evidence tends to infer that information leading to investigation of both charges was obtained from the same source, the witness Clark. Counsel for appellant contends that the facts in this case are similar to those in *United States v. Koch,* 2nd Cir., wherein the Court said:

> The appellant was tried and convicted in the District Court on an indictment in one count charging him with having conspired . . . to violate . . . (the Federal Narcotics Laws). . . The appellant requested the Court to charge, and duly took exceptions to the refusal so to do, that there was no proof that he knew that the drugs had been

imported into the United States from Canada or that he was connected with the conspiracy to import drugs into the United States from Canada in violation of Sections 173 and 174, Title 21 of the United States Code Annotated. It was error to decline to comply since that left the case as submitted generally to the jury the issue of a conspiracy to commit an offense not proved together with issues as to what we may now assume, without deciding, was an established conspiracy between appellant and Kobach to sell narcotic drugs in violation of Secs. 2553 and 2554 of 26 U.S.C.A. Int. Rev. Code. As the appellant protected his rights by properly calling the matter to the court's attention and preserving exceptions, he is entitled to a reversal.

United States v. Koch et al., 2nd Cir., 113 F. 2d 982, 983, 984.

To the same effect:

United States v. Smith, 2nd Cir., 112 F. 2d 83;
United States v. Groves, 2nd Cir., 122 F. 2d 87.

Upon the merits of the Motion For Judgment of Acquittal counsel submits that the opinion of the Court in *Eng Jung v. United States,* 3rd Cir., 46 F. 2d 66, 67, is pertinent:

The government sought to draw the conclusion that the opium found in the possession of certain tenants was in the possession of the defendant. Aside from the question of possession in fact, it could not be said that there was even constructive possession. Such possession could not be assumed from the facts shown. If it be granted that the facts shown are sufficient to raise a suspicion

against the defendant, verdicts in criminal cases cannot rest on suspicion. The sanction of the law requiring proof of guilt, beyond a reasonable doubt, intended for the protection of innocence, must be steadily observed.

In a case where the evidence is circumstantial, the test to be applied is "whether as a matter of law reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence."

Remmer v. United States, 9th Cir., 205 F. 2d 277, 287, 288.

Counsel contends that reasonable minds must find that upon Counts I and II that the persons known to be in the building other than the defendant, or other persons may have supplied the informer with narcotics, without the defendant being involved in any way; and therefore counsel contends that it was an abuse of discretion to reserve a ruling upon the defendant's motion, and that allowing that evidence to go to the jury was prejudicial to the decision upon Counts III and IV, as hereinafter shown.

II.

THAT THERE WAS ERROR OF THE COURT AND MISCONDUCT OF THE UNITED STATES ATTORNEY IN RELATION TO THE TESTIMONY OF JOHNNY CLARK.

The U.S. Attorney adduced the following evidence from the witness, Johnny Clark, whom he had called, "You are charged with murder in the State Court,

are you not? A. That is right." Objection made by defense counsel was sustained, motion for mistrial was made, and the Court sustained the objection and instructed the jurors to take no note of the question or the answer (R 111). However oblique reference was again made to this prosecution much later in the proceedings on prosecution's examination of an enforcement officer: "I told Mr. Clark that this United States Attorney's office would—should be follow through and tell the truth, this United States Attorney's office would refer his cooperation in the case to the State's attorney for whatever consideration they would take in their action against him" (R 170). Counsel contends that it is well established that a party may impeach his own witness only in special circumstances, and then only by cross-examination, or by prior inconsistent statements. Counsel contends that even if this witness had not been called by the prosecution, the question would be error in that it was not as to a conviction, but merely as to a prosecution. In *Verro v. United States,* 3rd Cir., 95 F. 2d 504, conviction was reversed solely because of error in allowing cross-examination as to arrest of a witness, and the same was true in *Terzo v. United States,* 8th Cir., 9 F. 2d 357. The following cases disapprove of examination of a witness regarding possible crime not resulting in conviction: *Sousa v. United States,* 9th Cir., 5 F. 2d 9; *Dawson et al. v. United States,* 9th Cir., 10 F. 2d 106, Cert. den. 271 U.S. 687, 70 L. Ed. 1152, 46 S. Ct. 638; *Mitrovich v. United States,* 9th Cir., 15 F. 2d 163.

Upon calling Johnny Clark to testify, the U.S. Attorney asked several introductory questions, and then asked questions as to two points upon the material issues, to which he received an answer that did not support his case. The first was as to whether a telephone call was made, and the second was "State whether or not you purchased any narcotics with money that was given to you by the officers specifically so that you could buy some narcotics with that money on that night." To both the witness answered no. Then in the presence of the jury the U.S. Attorney claimed surprise (R 91). Then outside the presence of the jury a document, which, according to the later testimony of Clark, was signed by Clark, was read. Agent Fahey had testified earlier that on May 29, 1956 at the "Narcotics Office", "We took a statement, I reduced it to writing—a statement from Mr. Clark. . . ." (R 69). The Court, after a statement by the U.S. Attorney (R 95, 96), ruled that the government was entitled to claim surprise (R 104). However, much later in the trial a federal narcotics officer testified on direct examination by the U.S. Attorney, "I had reason to believe that Johnny Clark would not cooperate with our office in this matter" (R 171). Upon the issue of claim of surprise counsel for the defendant, prior to the Court's ruling argued to the Court as follows, "But there is one other thing that must be apparent to the Court, and that is that some affirmative damage must be done to the case. This witness has testified to nothing practically, at this point. He simply says that nothing happened" (R 96, 97).

Objection was made by counsel for the defendant repeatedly to any reading of the purported statement which had not been formally admitted to evidence, on the ground that there was not a sufficient foundation for it (R 110, 112, 113, 114).

Counsel for the appellant contends that the proper foundation for prior inconsistent statements was not laid here because testimony claimed to be surprising to the U.S. Attorney was merely negative in its effect on the government's case.

> ". . . if a party interrogates a witness about a fact which would be favorable to the examiner if true and receives a reply which is merely negative in its effect on examiner's case, the examiner may not by extrinsic evidence prove that the first witness had earlier stated that the fact was true as desired by the enquirer. An affirmative answer would have been material and subject to be impeached by an inconsistent statement, but a negative answer is not damaging to the examiner, but merely disappointing and may not be thus impeached."
>
> McCormick, Evidence, Sec. 36 at P. 67.

After the jury was returned to the courtroom, the U.S. Attorney resumed his examination of the informer and made a more extensive examination (R 107, 108, 109, 112) than had been made before the claim of surprise. When asked whether he had made a written statement to the Federal Bureau of Narcotics about buying narcotics on the night in question, the informer, Clark, refused to answer, claiming the privilege of the fifth amendment against self-incrimi-

nation (R 109). Thereafter the U.S. Attorney showed the purported statement to the witness, and he testified that it was the first time that he had seen it "knowing what was on it" (R 109, 110, 111).

The U.S. Attorney did not offer the purported statement into evidence, but nevertheless caused the statement to be read in part (R 110), and read from it himself, prefacing the statement with the remark, "Johnny, in this statement, which is over your signature, the following is said: . . ." (R 113). Objection was made by defense counsel to these readings from the document (R. 110, 112, 113, 114). Although there appears to be a conflict of authority upon the question, there is authority which holds that mere proof of signature to a purported written statement is not sufficient to allow it to be admitted as evidence of prior inconsistent statements. In *Hoagland v. Canfield,* 160 Fed. 146, 164, 165, where the witness admits the signature, but denies having read the statement, though he admitted having made a statement to the investigator who wrote the statement, the Court held that the paper was not in evidence and that counsel could not read from the paper. This rule seems particularly appropriate where the witness is unable to read as in *Colby v. Avery,* 40 Atl. 2d 841. In *Altieri v. Public Service Ry. Co.,* 103 N.J.L. 351, 93 N.H. 250, 135 Atl. 786, 787 it was held that the trial Court did not err in excluding a signed written declaration of facts, denied by witness and offered to impeach him, where neither the party who wrote the statement nor any one else testified that the declaration contained a true account of what the witness said.

The testimony of this witness before surprise was claimed covers less than two pages of the record on appeal (R 90, 91). His actual testimony after surprise was claimed covers eleven pages of the record on appeal (R 106 through 117). Neither in the questioning before the surprise was claimed nor in the subsequent questioning before the informer was confronted with the purported statement, was the informer asked whether he had made a purchase of narcotics from the appellant (R 89, 90, 91, 106, 107, 108, 109), but numerous questions bearing upon that issue were later propounded (R 116, 117) and part of one question contained the words, ". . . this parcel of heroin which you just purchased from Sam?" (R 118).

The record shows that in the extensive cross-examination of the witness Clark, both before and after the reading of the purported statement, there was never any indication that the cross-examination would elicit from the witness any testimony favorable to the prosecution. Counsel for the appellant submits that the form of these questions was narrative, and that they were not concentrated upon the subjects of the questions which were asked on direct examination.

Concerning the cross-examination and impeachment of the witness Clark counsel contends:

(1) that it was error for the Court to rule that the U. S. Attorney could proceed under claim of surprise where there was no affirmative damage to the case;

(2) that the damage, if any, caused by the questions asked after the claim of surprise, was self-inflicted

damage, and thus not the proper subject of a showing of prior inconsistent statements;

(3) if the claim of surprise was proper, that the impeachment and cross-examination of the witness was far beyond the point of surprise and greatly more extensive than necessary to explain the calling of the witness, and to contradict those answers of the witness to which here may have been true surprise.

> The rule in its original and strict form against impeaching one's own witness is discredited everywhere, and it is generally recognized that impeachment may be resorted to where a witness has surprised the party offering him, by his testimony. . . . Further, it is equally fundamental that the impeaching testimony be admitted not for the purpose of supplying what the witness was expected to, but did not, say as a basis for a verdict, but only to eliminate from the jury's minds any positive adverse effect which might have been created by the testimony which has surprised the offeror . . . "On a showing to the court that it ought not to be bound by what (the witnesses it offered) had testified, because it had been entrapped by them," New York Ins. Co. v. Bacalis, 5 Cir., 94 F.2d 200, 202, the court may, in the exercise of its discretion, limiting the impeaching matter to the point of the surprise, permit evidence to remain in the record for such weight as it may have in the light of its impeachment, and of a careful instruction by the court, that the impeaching evidence is not at all admitted as evidence in the offerer's favor, but for what effect it may have in overcoming the testimony which has surprised the offerer. In short, the impeaching and contradictory statements are "ad-

mitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony." Id. . . . Neither even where there is a real surprise, is it proper to permit the impeaching testimony to go beyond the only purpose for which it is admissible, the removal of the damage the surprise has caused. In no event may the fact that a witness has made contradictory statements be used as it was here, as a basis for completely discarding the rules of evidence against hearsay and ex parte statements, and damaging hearsay. Dewey Ward v. United States, 5 Cir., 96 F.2d 189. . . . All of these cases make it clear that to admit such contradictions, there must be not only surprise, but damage, and the damage claimed must not have been self-inflicted by continuing to put in damaging testimony after the witness's hostility or change of front has been discovered in order to open the gate to let his favorable ex parte statements in. Royal Ins. Co. v. Eastham, supra. (5 Cir., 71 F.2d 385.)

Young v. United States, 5th Cir., 97 F. 2d 200, 205-206, 117 A.L.R. 316.

It is the established rule that impeachment of one's own witness may be resorted to where his testimony has surprised the party offering him. However, the impeaching matter is to be limited to the point of surprise and even where that is a real surprise it is not proper to permit the impeachment testimony to go beyond the only purpose for which it is admissible, i.e., the removal of the damage the surprise has caused. "In no event may the fact that a witness has made contradictory statements be used as it in effect was here, as a basis for completely discarding the

rules of evidence against hearsay and ex parte statements, and as impeachment, opening the floodgates of prejudicial and damaging hearsay." Young v. United States, 5 Cir., 97 F.2d 200, 206. Moreover, the damage claimed must not have been self-inflicted by continuing, as here, to put in damaging statements after the witness' hostility has been discovered.

Culwell v. United States, 5th Cir., 194 F. 2d 808, 811.

Young v. United States, supra, and *Culwell v. United States,* supra, are followed in the State of Washington. *State v. Thorne*, 260 P. 2d 331, 43 Wash. 2d 47.

That the impeachment must be limited to the point of surprise and be admitted only for the purpose of removal of the damage the surprise has caused is well settled. *Forrester v. United States,* 5th Cir., 210 F. 2d 923, 926; *Apodaca v. United States,* 5th Cir., 200 F. 2d 775.

In *Kuhn v. United States,* 24 F. 2d 910, 9th Cir., this honorable Court held that where the United States Attorney questioned his own witness extensively as to prior inconsistent statements, where only a few questions to that witness had indicated that he either did not know anything of the issues or that he was not going to cooperate, there was error. However as the Court made frequent admonitions and as the U. S. Attorney on his own motion consented that the testimony be withdrawn, and for other reasons, this honorable Court held that the error was not

The testimony of prosecution witnesses related the witness Clark to the charges under Counts III and IV (R 70, 71, 120, 133, 134, 160), by testimony referring to a conference upon the evening of June 19, 1957. It was testified, "At that meeting we had a conversation with Johnny Clark" (R 160). "We held a short conference and immediately Agent Du Puis, Chan Kirschner and I raced to the fire plug at 26th and East Thomas" (R 71).

Thus counsel raises the question of whether error in evidence primarily submitted to prove Counts I and II did not prejudice the trial of Counts III and IV, because of an implication that the witness Clark had forecast illegal activities on the part of the defendant, on the day referred to in Counts III and IV.

IV.

THAT THE EVIDENCE ADDUCED UNDER COUNTS III AND IV WAS NOT SUFFICIENT UPON WHICH TO BASE A VERDICT OF GUILTY.

Testimony as to what occurred at 26th and East Thomas on the evening of June 19, 1956 was given by Charles Fahey, and Charles F. Du Puis, treasury agents for the Bureau of Narcotics, and C. F. Kirschner, Detective, Narcotics Detail, Seattle Police Department (R 70, 120, 129). They and other officers met with Johnny Clark at Seventh and Madison, and there was "a short conference" (R 71) and "immemiately Agent Du Puis, Chan Kirschner and I raced to the fire plug at 26th and East Thomas." (R 70, 71).

In describing the intersection at 26th and East Thomas Agent Fahey testified that East Thomas does not continue west beyond its intersection with 26th Street, and that looking to the west of the intersection "you are looking directly into a brushy, wooded bank, with a long flight of stairs leading up to Madison." He further testified that there was a fire plug on the southeast corner of the intersection. He testified that "There is a street light, but it was not burning." (R 72, 73). Agent Kirschner testified ". . . on Madison Street there are three sodium vapor lights lighting the entire area for possibly three-quarters of the way down the stairs." And, he testified that the light condition at the base of the stairs and around that intersection "was dark—semi-dark. It wasn't too good." (R 134). Agent Du Puis, Kirschner, and Fahey then searched the region of the fire plug (R 73). Agent Fahey testified that they then all went around the corner in the auto and eastward down East Thomas, about three-quarters of a block, and parked at the curb (R 74). He further testified, "Du Puis pulled into the curb and cut his lights, and we were holding a little hurried conference, and Chan got out of the car, and we made a plan, and I am starting out and got out of the car, and my coat is hung up on the ashtray or something, and Du Puis directed our attention to the stairway and I see a man coming down the stairs." (R 74). The time from leaving the fire plug to leaving the car was "not over two minutes" (R 135). It was possible, testified Agent Kirschner, that someone could have come up to the fire plug area if they crawled, and he would not have

seen them during the time they were away from the plug (R 142). But regarding the time of the initial search of the fire plug area Agent Du Puis testified to the question, "Is it possible there were some other people around there at that time and you wouldn't see them?", "This is quite correct." (R 126). He further testified that it was possible that there could be a person or persons concealed in the wooded area (R 126). Agent Du Puis after the other officers were aware of the figure on the stairs, and after the other officers had left the auto, he allowed the auto to roll down the street, turned it around at the bottom, backing up once, then drove it up the hill (R 122, 123). He testified, "I came back up the hill, and I turned my lights on, and as I came up the hill my lights flashed on a man wearing a light top-coat. He was on the first landing of the steps running towards East Madison (R. 123). The agent testified that he recognized the man as Sam Blassingame (R. 123). Agent Fahey testified that after they left the car he and Agent Kirschner ran up the hill and that he, Agent Fahey, saw "the man . . . going fast down the stairs." He testified, "about the time the man is standing over the fire plug, I can feel headlights, and I hit dirt," about sixty or fifty feet from the fire plug (R 74, 75). He testified that he started to run again and the man had gone at a trot up about four steps, and "whirled around looking" and that the "car's headlights have him tagged on the steps" and that it was the defendant (R 75). He joined Agent Kirschner and they made no pursuit though the man was pacing at the top of the steps, fifty or sixty feet away (R 76).

The agents discovered a package next to the fire plug, they testified (R 76), and other testimony identified the contents of the package as heroin.

Agent Du Puis testified that he was away from the intersection five to ten minutes, and that when he returned a man other than Sam Blassingame was in custody (R 126). Concerning this arrest Agent Kirschner testifies that he and Agent Fahey, saw a car come up East Thomas, go around the corner and park on 26th, and a man got out who came up to the fire plug area and was arrested (R 145, 146). Sam Blassingame was available for arrest at all times from June 19, 1956 to September 27, 1956, (R 156), but the arrest was not made until September 27, 1956.

Counsel for the appellant questions whether the evidence is sufficient to establish possession in the defendant. They submit under the testimony reasonable minds would find that someone other than the man seen coming down the stairs, and testified to have been later identified as defendant, could have thrown the evidence from a concealed position nearby, or could have crept to the fire plug, both while the officers were parked down the hill. Counsel contends that such a possibility is logical in that it is reasonable to suppose that acts of the nature charged would be done furtively.

> If it be granted that the facts shown are sufficient to raise a suspicion against the defendant, verdicts in criminal cases cannot rest on suspicion. The sanction of the law requiring proof of guilt, beyond reasonable doubt, intended for the

protection of the innocence, must steadily be observed.

Eng Jung v. United States, 3rd Cir., 46 F.2d 66, 67.

Possession of the instruments or fruits of crime by a defendant in order to be incriminating must have been known to him, actual, dominant, with plenary power of disposition.

Grantello v. United States, 8th Cir., 3 F.2d 117, 118.

V.

THAT HAD THERE BEEN NO PREJUDICIAL ERROR AND HAD THE MATTERS UNDER COUNTS I AND II NOT BEEN SUBMITTED TO THE JURY, THE JURY MIGHT WELL HAVE FOUND A VERDICT OF NOT GUILTY UPON COUNTS III AND IV.

Counsel for appellant contend that the errors and misconduct of the U. S. Attorney tended to place an onus of guilt upon the defendant. Stripped of that evidence which related to Counts I and II, there might well have been reasonable doubt as to the evidence under Counts III and IV. Counsel submits that in some particulars the evidence of the law enforcement officers is conflicting, and that the hypothesis of guilt is based upon an involved chain of testimony, many links of which might easily be doubted. Counsel submit that the entire consideration of Counts III and IV may well have been clouded by the jury's concurrent consideration of the evidence under Counts I and II, by the erroneous evidence admitted against the defendant under Counts I and

II, and by the inference that the government had been forewarned by Johnny Clark, about whom evidence was erroneously admitted, that the defendant would engage in criminal conduct at the place and time referred to in Counts III and IV.

> We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. . . . The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.
>
> *Little v. United States,* 10th Cir., 73 F.2d 861, 866, 867.

CONCLUSION.

Appellant believes that this honorable Court should reverse the judgment heretofore imposed because of the foregoing specified errors.

Wherefore, it is respectfully requested the judgment imposed in said cause be reversed.

Dated, San Francisco, California,
December 20, 1957.

BENJAMIN M. DAVIS,
JAMES W. FUNSTEN,
Attorneys for Appellant.